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No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The centerpiece of the argument in support of the judgment is the assertion that the *Miranda* doctrine is non-constitutional in character, so that Congress was free to supersede this Court's holdings with a statute that restores the due process "voluntariness" inquiry. Brief of Court-Appointed Amicus Curiae Paul G. Cassell 4-28. As we show below, that proposition is untenable. In the alternative, amicus argues (Br. 28-48) that, despite Congress's manifest intention to turn the clock back and restore the voluntariness test in 18 U.S.C. 3501, that statute and a variety of unrelated provisions do not return the law to its pre-*Miranda* state, but in fact provide adequate additional safeguards for Fifth Amendment rights; and, if that is not so, *Miranda* should be reconsidered and rejected.

None of those propositions is sound. This Court's consistent application of *Miranda* to the States over the past 34 years establishes its constitutional character, such that it is not subject to plenary revision and overruling by Congress. The purpose and effect of Section 3501 is not to provide substitutes for the *Miranda* safeguards, but to reject the need for any such safeguards. And the burden required to justify the overruling of *Miranda*, and to return litigation over confessions wholly to the voluntariness test that this Court found inadequate 34 years ago, is a heavy one, and it has not been met in this case.

Miranda rests on the proposition that, in the distinctive context of custodial interrogation, systemically adequate safeguards are required to protect a suspect's rights under the Self-Incrimination Clause. *Miranda* warnings are not the only permissible safeguards, this Court has made clear, but some safeguards must exist. Section 3501 rejects that premise. That premise, however, has long been a central principle of the Court's constitutional criminal jurisprudence, and we do not find justification to urge this Court to overrule its precedents that have stood for 34 years. As Chief Justice Burger explained in 1980, "[t]he meaning of *Miranda* has

become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (Burger, C.J., concurring).

I. CONGRESS MAY NOT "OVERRULE" *MIRANDA* BY REINSTATING A PURE VOLUNTARINESS TEST

Amicus contends (Br. 4-28) that this Court need not formally overrule *Miranda* in order to uphold Section 3501 because *Miranda* is defeasible by Congress at will. That contention cannot be reconciled with this Court's practices in applying *Miranda* or with bedrock principles of criminal procedure.

A. *Miranda* And The States

Amicus seeks to reconcile this Court's consistent application of *Miranda* to the States with his view that *Miranda* is a "nonconstitutional measure[]" (Br. 17) by positing that this Court has power, in the absence of contrary legislation, to impose rules on the States that are not constitutionally required. Amicus's theory is fundamentally inconsistent with this Court's holdings on its role in reviewing state convictions.

1. *Review of state convictions.* Because this Court's authority in state cases "is limited to enforcing the commands of the United States Constitution," *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991), the Court could not have applied *Miranda* to the States during the past 34 years without concluding that the Constitution required such application.

Amicus takes issue (Br. 18 n.12) with this Court's statement in *Mu'Min*. He asserts instead (Br. 17) that, in the absence of contrary legislation, "the Court has some authority to impose on the states nonconstitutional measures designed to protect constitutional rights," and that this premise is "at the heart of [amicus's] explanation of the legal basis of *Miranda*." In amicus's view, because *Miranda*'s exclusionary rule "is not a requirement of the Fifth Amendment" (Br. 10), it follows that Congress has the authority to "modify" it (Br. 12). By "modify," amicus apparently means

"eliminate": in his view, Congress may abrogate *Miranda*'s holding and mandate that voluntariness alone is the only prerequisite for admissibility. Nothing in this Court's cases supports that view of Congress's power over rules that this Court has applied to the States.

In order to uphold Section 3501 on the theory that *Miranda* is a "nonconstitutional measure" that is defeasible at the will of Congress, this Court would have to repudiate core principles governing its review of state criminal cases. This Court has frequently been guided by the proposition that it "do[es] not establish procedural rules for the States, except when mandated by the Constitution." *Barker* v. *Wingo*, 407 U.S. 514, 523 (1972); accord *Victor* v. *Nebraska*, 511 U.S. 1, 17 (1994) ("[W]e have no supervisory power over the state courts.").[1] The principle that the Court may not reverse state court decisions except for violations of the Constitution or a federal statute is one that Members of the Court have recognized to be "obvious." See *Carter* v. *Kentucky*, 450 U.S. 288, 307-308 (1981) (Rehnquist, J., dissenting) ("[S]ince the result of the Court's decision is to reverse the judgment of the Supreme Court of Kentucky, the decision must obviously rest upon the fact that the decision of that court is inconsistent with the United States Constitution."). To accept amicus's theory of *Miranda*'s application to the States would not only contradict that principle; it would vastly enlarge this Court's power to reverse state convictions based on rules that are not constitutionally compelled.

2. *Application on habeas corpus.* This Court's recent application of *Miranda* on habeas corpus also conflicts with amicus's view that *Miranda* is common law rather than constitutional doctrine. In *Withrow* v. *Williams*, 507 U.S. 680,

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[1] See also *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982); *Harris* v. *Rivera*, 454 U.S. 339, 344-345 (1981) (per curiam)); *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.8 (1976); *Cicenia* v. *Lagay*, 357 U.S. 504, 508-509 (1958); *Gallegos* v. *Nebraska*, 342 U.S. 55, 63-64 (1951) (plurality); *Townsend* v. *Burke*, 334 U.S. 736, 738 (1948); *McNabb* v. *United States*, 318 U.S. 332, 340 (1943).

690 (1993), the Court fully acknowledged *Miranda*'s "prophylactic" character, yet concluded that "in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental *trial* right." *Id.* at 691 (internal quotation marks omitted); see *id.* at 689 (describing *Miranda*'s "now-familiar measures in aid of a defendant's Fifth Amendment privilege"); *id.* at 692 (discussing "the Fifth Amendment 'trial right' protected by *Miranda*"). The Court nowhere suggested that it regarded *Miranda* as one of the "laws of the United States" that may be enforceable on habeas corpus. 28 U.S.C. 2254(a).[2]

B. *Miranda* And The Constitution

Amicus offers his radical theory to explain this Court's application of *Miranda* to the States because he concludes that this Court's later cases have stripped *Miranda* of a constitutional basis. See Br. 28 (*Miranda* is an "extraconstitutional" rule). Relying on this Court's statements that the *Miranda* rules are "not themselves rights protected by the Constitution," *New York* v. *Quarles*, 467 U.S. 649, 654 (1984), and that they "sweep[] more broadly than the Fifth Amendment itself," *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985), amicus contends (Br. 4-9) that the *Miranda* doctrine cannot be constitutionally based, and, accordingly, Congress is free to require the admission of unwarned confessions without providing any substitute protective framework. Amicus misunderstands the source and nature of *Miranda*.[3]

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[2] As authority for the view that application of *Miranda* on habeas implements the "laws of the United States," amicus cites (Br. 21-22), a treatise by Professor Yackle. In fact, however, Professor Yackle principally maintains that *Miranda* violations are cognizable on federal habeas, because to hold otherwise would be to "eliminate" the "substantive [constitutional] right[], not merely [a] judge-made remed[y], * * * from the scope of habeas corpus." L. Yackle, *Post Conviction Remedies* § 96, at 370 (1981).

[3] Amicus's defense of Section 3501 would also leave intact *Miranda*'s application to the States. A theory that imposes *Miranda* on the States but not on the federal government has no constitutional coherence. Perhaps amicus would posit that States too could opt out of *Miranda* by enacting the voluntariness test, but that theory violates the Supremacy Clause: a State may not nullify federal law.

Miranda responded to this Court's conclusion—after 30 years of grappling with the due process voluntariness test on a case-by-case basis—that additional protections, above and beyond the totality-of-the-circumstances test, are required to provide safeguards in view of the coercive pressures of custodial interrogation.[4] The Court thus crafted a prophylactic framework to provide systemic protection for rights guaranteed by the Self-Incrimination Clause. See *Michigan* v. *Tucker*, 417 U.S. 433, 443-444 (1974). As this Court has since explained:

> Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that *neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause.*

Minnick v. *Mississippi*, 498 U.S. 146, 155 (1990) (emphasis added). Far from concluding that developments since *Miranda* have deprived that case of constitutional support, the Court reaffirmed, nearly two decades later, that *Miranda* "strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's

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[4] Commentators recognize the inability of the "totality" test, standing alone, to secure the constitutional rights at stake. See, *e.g.*, 2 W. LaFave & J. Israel, *Criminal Procedure* § 6.2(d), at 467 (1999) (noting the Court's failure to "articulate a clear and predictable definition of voluntariness"); S. Saltzburg & D. Capra, *American Criminal Procedure: Cases and Commentary* 514 (5th ed. 1996) ("The word 'voluntary' hardly offered clear guidance to law enforcement officers and to lower court judges. It had to be defined anew in every case. * * * In fact, each [of the Supreme Court's] totality of the circumstances decision[s], it might be argued, caused a greater division among lower trial and appellate courts."); see also U.S. Br. 40-41 & n.32 (discussing pre-*Miranda* cases).

Fifth Amendment rights." *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986); see also *Elstad*, 470 U.S. at 317 (the Court "in no way retreats from the bright-line rule of *Miranda*").

The Court's recognition that *Miranda* warnings are not, in all circumstances, required to satisfy the Constitution (see Amicus Br. 7-8) in no way undermines the proposition that the *Miranda* framework rests on this Court's authority to interpret and apply the Constitution. Indeed, it is precisely because the *Miranda* cases create a prophylactic framework that this Court may shape the governing legal rules, applying the *Miranda* doctrine where its purposes are best served and declining to do so where its purposes would be less well-served or where it would impose special or unusual costs. This Court has done so by, among other things, permitting the use of unwarned statements for impeachment, see *Harris* v. *New York*, 401 U.S. 222, 224 (1971); *Oregon* v. *Hass*, 420 U.S. 714, 722 (1975), and dispensing with the warnings where public safety so requires, *Quarles*, 467 U.S. at 651. Sustaining *Miranda*, however, would hardly require overruling *Quarles*, *Harris*, and *Hass*, among other cases. See Amicus Br. 8-9 & nn.4-5. This Court's *Miranda* cases have held that the Constitution generally requires a set of procedural safeguards that serve systemic values, but the Court has also recognized that such safeguards need not be imposed inflexibly and without regard to competing concerns.[5]

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[5] Amicus finds (Br. 6-7) this Court's statements that the *Miranda* safeguards are not themselves constitutional rights to be irreconcilable with a conclusion that *Miranda* has a "constitutional basis." In *Elstad*, however, the Court explained that "[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." 470 U.S. at 317. That presumption explains how unwarned statements can be excluded from evidence consistent with the Fifth Amendment's text that a defendant may not be "compelled * * * to be a witness against himself." The *Miranda* conclusive presumption is a legal rule, but that does not distinguish it from voluntariness determinations. The "totality of the circumstances" test also resolves a question of *law* about the permissible "techniques for extracting the statements"; it is not a question of historical fact. *Miller* v. *Fenton*, 474 U.S. 104, 116 (1985).

Nor is *Miranda* invalidated by the Court's conclusion (384 U.S. at 467) that *either* the *Miranda* rules *or* some equally adequate alternative is necessary to protect the Fifth Amendment privilege. See Amicus Br. 6-7, 11-12. In that respect, *Miranda* is supported, rather than undercut, by *Smith* v. *Robbins*, 120 S. Ct. 746 (2000). *Robbins* explained that the procedure outlined in *Anders* v. *California*, 386 U.S. 738 (1967), for the withdrawal of court-appointed appellate counsel who views his client's claims as frivolous was not "an independent constitutional command" but instead constituted "'a prophylactic framework' that we established to vindicate the constitutional right to appellate counsel." 120 S. Ct. at 757. The decision in *Anders*, the Court noted in *Robbins*, "simply erect[ed] 'safeguards.'" *Ibid.*[6] *Robbins* thus held that, when counsel for an indigent defendant concludes that the appeal is frivolous and seeks to withdraw, States must have "procedures [that] adequately safeguard a defendant's right to appellate counsel." *Id.* at 753; see also *id.* at 760. Yet the Court also made clear that no single set of procedures is required—the test is whether a particular procedure "reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Id.* at 759.[7] Finally, *Robbins* held that, even where a State provides adequate procedures for assuring that appointed counsel will not improperly withdraw, a defendant may still

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[6] This Court's description of *Miranda* is to the same effect: *Miranda* provided a set of "procedural safeguards" that are "prophylactic" in character. *Michigan* v. *Tucker*, 417 U.S. at 444, 446.

[7] *Miranda* similarly contemplated legislative alternatives: "[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process. * * * We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." 384 U.S. at 467.

claim that he was deprived of the underlying constitutional right to counsel, under the test of *Strickland* v. *Washington*, 466 U.S. 668 (1984). 120 S. Ct. at 763-764.[8]

In all of those respects, *Robbins*'s constitutional analysis runs parallel to *Miranda*: in both settings, a prophylactic set of procedures is required to protect rights; a legislature may experiment with alternative procedures, subject to this Court's review for adequacy; but a legislature may not simply eliminate *all* such procedures in favor of correcting actual violations on a case-by-case basis. Whether or not rules such as *Miranda* and *Anders* are properly described as "constitutional common law" (Amicus Br. 10 n.7), they "cannot be overturned by mere congressional disapproval. * * * Congress may override preemptive lawmaking based on the Constitution, but only if the federal courts independently conclude that Congress has enacted a statute that provides roughly the same degree of protection for constitutional policies as the federal common law rule." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 57-58 (1985).

C. A Plenary Congressional Power To Overrule *Miranda* Has No Case Law Support

Amicus seeks support for his theory of congressional power to modify or overrule this Court's constitutional holdings in several other branches of this Court's jurisprudence. None of those lines of cases assists him.

1. *Bivens.* In *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971), this Court, exercising the traditional authority of courts "to adjust their remedies so as to grant the necessary relief," *id.* at 392, recognized a cause of action for damages

[8] *Miranda* has the same feature: even when the warnings have been given, the suspect may still raise a claim that subsequent statements were involuntary under the totality-of-the-circumstances test. See *Withrow* v. *Williams*, 507 U.S. at 693-694. In practice, however, once a defendant waives his rights after adequate warnings, the voluntariness claim is virtually sure to fail. See U.S. Br. 36-38.

against federal officials for the violation of Fourth Amendment rights. The Court drew on the judicial power, authorized in the grant of general federal question jurisdiction in 28 U.S.C. 1331: "In the absence of * * * a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal." *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983).

The Court has held that Congress may displace *Bivens* actions, at least when it provides "constitutionally adequate" alternatives. *Bush*, 462 U.S. at 378 n.14. Assuming that Congress may completely eliminate a *Bivens* remedy in a particular context (a question the Court has reserved), *Bivens* does not furnish an analogy to *Miranda*. *Bivens* was not based on a constitutional requirement deriving from the Fourth Amendment, but on the Court's traditional authority under Section 1331 to imply a cause of action for damages in federal court to remedy a completed violation of law. Congressional power over the implication of such federal causes of action for damages has always been recognized as plenary. By contrast, *Miranda* and the cases following it are based on the proposition that the Self-Incrimination Clause requires safeguards to prevent violations in the distinctive context of custodial interrogation. Plenary congressional authority over whether the Constitution requires safeguards would be inconsistent with this Court's cases from *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), to *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).[9]

[9] Amicus also cites *Mapp* v. *Ohio*, 367 U.S. 643 (1961), to exemplify his view that this Court has "authority to improvise measures to assist in the protection of constitutional rights where neither the Constitution nor the legislature has specified a particular mechanism for protecting those rights." Br. 10. He does not expressly assert that Congress could, without providing an adequate alternative, simply eliminate the exclusionary rule. But, because the exclusionary rule is not a "personal constitutional right" of the defendant, *United States* v. *Leon*, 468 U.S. 897, 906 (1984), amicus's theory about *Miranda* necessarily implies that result. In effect,

2. *Act of State and Commerce Clause Cases.* Amicus asserts that in cases applying the Act of State doctrine, the Court has recognized its authority to a craft a rule applicable to the States that is "subject to revision and restriction by Congress as a judicially developed, nonconstitutional rule, even while the Court's authority to craft it in the first instance is not seriously in doubt." Br. 18; see also Br. 18 n.11. The Act of State doctrine is not comparable to *Miranda*. It recognizes limitations on judicial inquiry into foreign governmental action. The authority of federal courts to adopt such a rule of decision and apply it to the States arises from constitutional grants of authority that "reflect[] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions." See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964). Because the doctrine protects powers reserved to the federal government, it necessarily binds the States. And because the ultimate constitutional responsibility for foreign affairs resides in the Executive and Legislative Branches, those branches have substantial latitude to modify the otherwise applicable judicial rule. Cf. *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767-768 (1972) (plurality opinion) (addressing authority of Executive Branch to supersede Act of State doctrine). By contrast, *Miranda* does not rely on or protect constitutional grants of authority to the political branches of the federal government. Therefore, those branches have no authority to abrogate this Court's decisions in *Miranda* and its progeny.

The dormant Commerce Clause cases cited by amicus (Br. 18 n.11) are irrelevant for a similar reason: that doctrine derives from and protects the plenary power of *Congress* to regulate commerce. See *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87-88 (1984) (dormant Commerce Clause is "a self-executing limitation on the power of the States," but it is "clear that Congress may redefine the distribution of power over interstate commerce by permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible") (Opinion of the Court; internal quotation marks omitted).

amicus would have this Court cede to Congress plenary authority to define the measures that are required to protect constitutional rights.

II. SECTION 3501 IMPERMISSIBLY RETURNS THE LAW TO ITS PRE-*MIRANDA* STATE

Amicus argues (Br. 28) that, even if the Court may require some "prophylaxis" beyond the voluntariness standard, Section 3501, "taken together with the legal landscape that surrounds it, provides more than adequate protection to safeguard suspects from police compulsion." Section 3501, however, was intended to—and does—simply return the law to its pre-*Miranda* state. See U.S. Br. 13-20; J.A. 197. Moreover, there are no changes in the surrounding "legal landscape" that compensate for Section 3501's abrogation of *Miranda*'s core holdings.

1. *Section 3501.* Section 3501 requires a court to admit a confession "if it is voluntarily given," 18 U.S.C. 3501(a), and it directs the court to "take into consideration all the circumstances surrounding the giving of the confession" in determining voluntariness, 18 U.S.C. 3501(b). Section 3501 thereby codifies pre-*Miranda* law, which in virtually identical terms required that "all the circumstances attendant upon the confession must be taken into account" in determining its voluntariness. *Reck* v. *Pate*, 367 U.S. 433, 440 (1961). Amicus does point out (Br. 33) that Section 3501 requires consideration of the defendant's knowledge of "the nature of the offense with which he was charged or * * * suspected," a factor that the Court subsequently concluded is not relevant to the voluntary waiver of Fifth Amendment rights. *Colorado* v. *Spring*, 479 U.S. 564, 577 (1987). Section 3501, however, does not require courts to give specific weight to that (or any other) factor. And to the extent that the defen-

dant's awareness of the charges might be relevant under Section 3501, although irrelevant under the Fifth Amendment, it would not serve any purpose in protecting *constitutional* values. See U.S. Br. 18 n.13.

Amicus also argues (Br. 32) that "[t]he incentives to [give *Miranda* warnings] that Section 3501 provides are much stronger than those in pre-*Miranda* law." He observes (Br. 32) that Section 3501 requires that a court, in determining voluntariness, "shall take into consideration all the circumstances surrounding the giving of the confession, including" whether a suspect "was advised or knew" of his right to remain silent and whether he "had been advised * * * of his right to the assistance of counsel," 18 U.S.C. 3501(b). Before *Miranda*, however, this Court had very frequently adverted to those same factors as important elements in the totality-of-the-circumstances voluntariness test. See U.S. Br. 15-16 nn.10-11 (citing cases). Amicus does not explain how a direction to courts that they "shall" consider all the circumstances, including two particular factors, differs in any significant way from pre-existing law, which required that courts "must" consider all the circumstances, *Reck*, 367 U.S. at 440 including (under this Court's cases) those same two factors.

2. *Other remedies.* Amicus also contends (Br. 34) that, apart from Section 3501, "the legal incentives for non-coercive police questioning today are almost unrecognizably greater than when *Miranda* was decided," and that those incentives, together with Section 3501, create a "constitutionally adequate alternative to the *Miranda* rules," Br. 37. Amicus fails, however, to substantiate that contention.

a. Amicus argues that *Bivens* actions are now available against federal law enforcement authorities, although "[w]hen *Miranda* was written, it was quite difficult as a practical matter to obtain damages in federal court from federal law enforcement officers who violated Fifth Amendment rights." Br. 34. Three of the four consolidated cases decided in this Court's *Miranda* decision were state cases. Damages against

state law enforcement officials for violations of constitutional rights had been recognized since this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), five years before *Miranda*. That remedy did not affect the result in *Miranda* or this Court's later cases. Amicus offers no reason to assign greater weight to that remedy now.

In any event, *Bivens* and Section 1983 actions are of little utility in protecting against "the compulsion inherent in custodial surroundings," 384 U.S. at 458, which is the focus of the *Miranda* rules. While the use of force to obtain a confession may be deterred by the prospect of a damages award under *Bivens* or Section 1983, *Miranda* does not address the use of violence. The subtler coercive pressures addressed by *Miranda* are far less likely to result in damages. Damages would also be rare because, when a confession is excluded from evidence, there would be no Fifth Amendment violation, see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); and when a confession is admitted and the conviction upheld, there would be no sustainable claim.[10]

b. Amicus's reliance (Br. 34-35) on the Federal Tort Claims Act, 28 U.S.C. 2680(h), is also misplaced, since psychological coercion in interrogation would not, standing alone, constitute an "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." *Ibid.*[11] In short, the remedies noted by amicus cannot make up for Section 3501's overt return to the pre-*Miranda* law governing the voluntariness of a confession.

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[10] 18 U.S.C. 241 and 242, also cited by amicus (Br. 35), are likewise unhelpful. Those remedies were available before *Miranda*, see *Williams* v. *United States*, 341 U.S. 97 (1951), and provide minimal protection to the Fifth Amendment privilege in the settings relevant in *Miranda* cases.

[11] Amicus also cites (Br. 35 & n.25) 28 U.S.C. 530B, which generally provides that government attorneys are subject to state ethics rules. Section 530B could not influence questioning in the vast majority of custodial interrogations, which are conducted by law enforcement agents without the involvement or direction of government attorneys.

III. THE SHOWING REQUIRED TO OVERRULE *MIRANDA* HAS NOT BEEN MADE

Our opening brief submitted that, applying settled principles of *stare decisis*, there is insufficient justification for overruling *Miranda*. The amici in support of the judgment largely avoid the term "overrule"; they instead request this Court to "modify" *Miranda* by "abandon[ing] the irrebuttable presumption that confessions obtained without compliance with the *Miranda* procedures are always involuntary." Cassell Br. 40. Because the government already bears the burden of establishing the voluntariness of a confession by a preponderance of the evidence, see *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972), adopting a rebuttable presumption is equivalent to overruling *Miranda* outright. That course is not warranted.

A. The Proportionality Of *Miranda*

Amicus argues (Br. 40-48) that *Miranda*'s irrebuttable presumption must be abandoned because it is not "congruent and proportional," see *Boerne*, 521 U.S. at 508, to an underlying constitutional right and is therefore beyond this Court's authority. That conclusion is mistaken.

The underlying point of the "congruence and proportionality" analysis, applied in *Boerne* in analyzing Congress's power under Section 5 of the Fourteenth Amendment, is to inquire whether remedial measures devised by Congress permissibly protect an underlying constitutional right or instead impermissibly redefine the right. See *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644-645 (2000). This Court has never said that such an analysis applies to the Court's own formulation of prophylactic constitutional standards. But, even if it were to do so now, the Court's prior holding that either *Miranda* or some adequate alternative is necessary to effectuate the Self-Incrimination Clause would satisfy that analysis.

Miranda itself extensively analyzed the nature of custodial interrogation, the utility of warnings in promoting a

voluntary decision by the suspect, and the impact on law enforcement of a warnings-and-waiver rule before concluding that such a rule (or an equally effective legislative safeguard) was necessary to protect the privilege. 384 U.S. at 445-491. In later cases, the Court has firmly adhered to the view that "the Court in *Miranda* was impelled to adopt" the irrebuttable presumption, *Garner* v. *United States*, 424 U.S. 648, 657 (1976), and that "protection of the privilege against self-incrimination during pretrial questioning requires application of special 'procedural safeguards,'" *Pennsylvania* v. *Muniz*, 496 U.S. 582, 589 (1990). In *Moran* v. *Burbine*, 475 U.S. at 424, 426-427, the Court reviewed the competing concerns implicated by custodial interrogation and reaffirmed *Miranda* as a "carefully drawn approach."

Amicus suggests (Br. 41-42) that under the "congruence and proportionality" test, a prophylactic rule is justifiable only if it operates where the underlying constitutional norm has been—or likely has been—violated. Amicus is incorrect. This Court has frequently recognized prophylactic rules, but it has never suggested that they must satisfy that standard. See U.S. Br. 44-47. For example, the Court in *Anders* and *Robbins* did not justify the prophylactic rule at issue there (see pp. 7-8, *supra*) by stating that, as an empirical matter, most instances in which appointed appellate counsel unilaterally withdraw involve appeals of arguable merit rather than frivolous appeals. A sensible approach to this Court's prophylactic rules instead considers the importance of the right, the efficacy of competing approaches, and the costs and benefits of a safeguard.[12]

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[12] The ultimate conclusion on the need for and efficacy of a prophylactic rule to effectuate a constitutional right is not a question of legislative policy or factfinding in this setting any more than it would be in other constitutional contexts. Amicus relies (Br. 26-27) on the 1968 Senate committee report on Section 3501 concluding that *Miranda* harms law enforcement. Although congressional factfinding is entitled to deference, Congress is not free simply to substitute its view for this Court's judgment regarding the ultimate constitutional balance to be drawn. See

B. The Costs And Benefits Of *Miranda*

The amici in support of the judgment believe that the costs of *Miranda*'s exclusionary rule outweigh any of its benefits. *E.g.*, Cassell Br. 46. We do not minimize the costs of excluding probative evidence, either in general or in any particular case. The question whether those costs are justified, however, involves a weighing of competing interests and an assessment of the actual impact of the rule. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433 (1976).

1. *The Exclusionary Rule.* *Miranda* serves at least three purposes. First, it provides procedures to dispel the inherent potential for compulsion in custodial interrogation. See *Moran* v. *Burbine*, 475 U.S. at 425, 426-427. Second, it provides a defined legal standard for the courts in place of the less determinate and more subjective voluntariness inquiry. See *Tucker*, 417 U.S. at 442-443. Third, it provides guidance for the police and prosecutors. *Spring*, 479 U.S. at 577 n.9. It achieves those goals through application of an irrebuttable presumption of compulsion only in the government's case-in-chief, and then only where not overborne by public safety interests. See pp. 4-6, *supra*.

This Court was fully aware in *Miranda* that its holding would preclude the use of some confessions. And the Court has since enforced the doctrine in cases in which the result has been to reverse convictions for serious crimes. See, *e.g.*, *Minnick* v. *Mississippi*, *supra*; *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Accordingly, the observation that *Miranda* violations will foreclose the use of some evidence cannot, standing alone, justify overruling that decision.

While the exclusionary rule does impose certain costs, it also enables this Court to define and enforce legal require-

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Boerne, 521 U.S. at 519; see also H. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 34 n.176, 42 n.217 (1975); Y. Kamisar, *Can (Did) Congress Overrule* Miranda*?*, 85 Cornell L. Rev. 883, 916-929 (2000) (forthcoming).

ments. By doing so, the Court facilitates the admission of the great number of confessions in which the police comply with *Miranda*. In the absence of such a restraining legal rule, there may be temptation to interrogate suspects without providing *Miranda* warnings, in the hope that a court could subsequently be persuaded that a resulting confession was voluntary. If the courts disagree, prosecutions may be seriously compromised. *Miranda* thus helps to ensure that statements made by suspects in custodial interrogation will ultimately be found admissible at trial.[13] We therefore agree with an American Bar Association committee that concluded that "[a]lthough the *Miranda* decision has sparked heated controversy on a political level, the restrictions it imposes are not considered troublesome by either police or prosecutors." ABA Special Comm. on Crim. Justice in a Free Society, *Criminal Justice in Crisis* 27 (1988). See also *ibid.* ("The Committee finds that *Miranda* does not have a significant impact on law enforcement's ability to solve crime or to prosecute criminals successfully.").[14]

2. *Federal Prosecutions.* With respect to the costs of the *Miranda* rule, our submission is informed by experience in federal prosecutions. Federal courts rarely order the suppression of statements under *Miranda*. Between 1989 and 1999, approximately 720,000 federal prosecutions were brought; during that period, according to the Justice Department's records, federal courts suppressed approximately 78 statements under *Miranda*—*i.e.*, one out of every 9,300 fed-

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[13] Some amici have pointed out that *Miranda* itself does not always provide a "bright line" test. Certainly, *Miranda* requires application of judgment. But this Court has regularly recognized that *Miranda* provides far better guidance to police and courts than a multi-factor "totality" test, see U.S. Br. 34 n.24, and experience has not suggested otherwise.

[14] We acknowledge that some members of the law enforcement community participating in this case contend that *Miranda* is harmful to law enforcement. With respect, we do not agree that the claimed harms are sufficient to justify overruling of *Miranda*. Other amici in the law enforcement community have filed briefs in agreement with our view.

eral prosecutions.[15] Suppression can impose a cost in a particular case that numbers cannot adequately convey. Nonetheless, the infrequency of suppression under *Miranda* in federal prosecutions weighs against overruling that decision.[16]

Amicus Cassell (Br. 24) states that, "contrary to the impression conveyed in the government's brief [at 34], the actual views of federal law enforcement agencies that have been lodged with the Court reveal serious difficulties with *Miranda*'s exclusionary rule." That is incorrect. In general, the letters we have lodged with the Court conclude that the core mandates of *Miranda* do not hinder law enforcement efforts in any significant way, although certain extensions of *Miranda* have caused some difficulties. U.S. Br. 35. For example, the FBI General Counsel stated that "[t]he FBI has very little difficulty complying with the relatively simple mandates of the *Miranda* decision," although "[p]roblems do occur * * * when those dictates are complicated by the additional protections afforded custodial subjects by [*Edwards*, *Roberson*, and *Minnick*]." The Treasury Department law enforcement agencies reported that they "favor the current legal framework and do not find that the issuance of *Miranda* warnings hinders their investigations," "would not support any modification to current practices," and "would [not] support replacing *Miranda* with the §3501 voluntari-

[15] The figures are reproduced and explained in the Appendix, *infra*.

[16] Amicus has acknowledged that only a "tiny fraction of cases * * * go forward but are later lost because of a *Miranda* suppression motion." P. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387, 394 (1996). In his writings, he has argued instead that the "typical" cost of *Miranda* is the result of "diminishing the confession rate and thus reducing the evidentiary strength of the prosecution's case." *Id.* at 437. That claim is highly debatable. See U.S. Br. 32 n.23. But since amicus now urges (Br. 31, 32 n.23) that under Section 3501 "federal law enforcement officers will almost certainly continue to give [*Miranda* warnings]," replacing *Miranda* with Section 3501 would not increase the number of confessions, and it would therefore do nothing to alleviate what amicus has consistently claimed is *Miranda*'s primary cost to law enforcement.

ness standard."[17] And the DEA reported that it is "unable to cite any incidents in which the requirement to provide *Miranda* warnings to a suspect adversely impacted on a case." Chief Counsel Memorandum (Feb. 22, 2000).[18]

Amicus Cassell asserts (Br. 25) that the Justice Department "has for many years supported the constitutionality of Section 3501." Amicus relies (Br. 25-25) principally on recommendations *to* the Attorney General (which did not result in formal policies) and recollections of certain former Justice Department officials in after-the-fact congressional testimony. Those sources do not express official Justice Department policy. The more telling and indisputable fact is that, "with limited exceptions [Section 3501] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." *Davis* v. *United States*, 512 U.S. 452, 463-464 (1994) (Scalia, J., concurring). That position implies both a rec-

[17] The Acting Chief of the Office of Tax Crimes stated that his office "finds no advantage by either modifying [its] current procedures concerning Miranda or adopting Title 18 U.S.C. §3501." The Commissioner of Customs stated that "I do not believe that the Miranda warnings have compromised Customs officers' ability to question suspects or obtain confessions admissible in court. The clear rule of Miranda provides firm guidance for our officers, and I strongly recommend that it not be changed." And the ATF, through its Assistant Director, reported that "[m]ost agents have grown accustomed to the Miranda process, and it generally does not disturb the progress of many investigations. * * * Section 3501 has the potential to cloud an area of the law that has become second nature to the investigator. Miranda has provided a good balance between the rights of the accused and the conduct of law enforcement."

[18] Amicus relies (Br. 25) on an earlier letter from a DEA official that states that the giving of *Miranda* warnings in "a stressful environment" following an arrest "can have a chilling effect" on a suspect's willingness to cooperate. Memorandum from Richard Fiano, DEA Chief of Operations 2 (Oct. 13, 1999). The DEA has made clear, however, that "regardless of any change in the *Miranda* rule which may result in this case, DEA will continue, as a policy matter, to counsel its Agents to provide *Miranda* warnings." Chief Counsel Memorandum (Feb. 22, 2000); accord DEA Deputy Chief Counsel Gleason Memorandum (undated, sent Oct. 1, 1997).

ognition of Section 3501's conflict with *Miranda* and the absence of sufficient reason to request this Court to overrule it.

3. *The alternatives to* Miranda. *Miranda* stated that "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described [in *Miranda*] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." 384 U.S. at 490. The precise standard of constitutional adequacy that an alternative safeguard must satisfy is not before the Court in this case. If Congress or a state legislature were to provide for a set of limited warnings coupled with video or audio taping of the interrogation, or for some other alternative set of safeguards, such as pre-interrogation access to a magistrate, counsel, or other competent advisor, the Court would be faced with the question whether the *Miranda* rules remained applicable in the jurisdiction at issue. Section 3501, however, as its supporters intended, see U.S. Br. 18-20, seeks to return the law to its pre-*Miranda* state without providing any alternative. That approach would require overruling *Miranda*.

In considering the sea change in the law that is being proposed, it is worth recalling that the *Miranda* Court arrived at its solution only after concluding that the "totality of the circumstances" voluntariness test, as the sole protection for the Fifth Amendment rights of a custodial suspect, had failed. The "totality" test had been found inadequate not because of bad faith by police, or because of unwillingness of courts to grapple with the inquiry. It was inadequate because a "totality" test, without more, provided insufficient guidance to the police, left inadequate means for this Court to unify and expound the law, and resulted in an uncertain legal rule that could not secure the vital constitutional rights at stake. There has been no showing that a return to that regime would be successful today.

Respectfully submitted.

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APRIL 2000

APPENDIX

Suppressed Statements Under *Miranda* In Federal Prosecutions

Year	Total Defendants Prosecuted*	*Miranda* Suppression Orders Reported to the Solicitor General**
1989	58,160	6
1990	60,521	7
1991	62,112	6
1992	66,502	10
1993	63,869	13
1994	62,327	2
1995	63,547	1
1996	65,480	3
1997	69,351	11
1998	78,172	9
1999	76,689	10
Totals	**726,730**	**78**

Notes

* The figures for "Total Defendants Prosecuted" for 1989-1998 are drawn from U.S. Department of Justice, Office of Justice Programs, *Federal Criminal Case Processing, 1982-98*, at 2 (Table 2); U.S. Department of Justice, Office of

Justice Programs, *Federal Criminal Case Processing, 1998*, at 26 (Table A.6). Information for 1999, through September 30, 1999, was obtained from the Department's Bureau of Justice Statistics. Memorandum from John Scalia (Mar. 15, 2000).

** The figures for the number of suppression orders are derived from adverse *Miranda* rulings (78) reported to the Solicitor General according to Justice Department requirements. See 28 C.F.R. 0.20(b); U.S. Attorney's Manual § 2-2.110 (June 1998). Seventy-six of those decisions were reported to members of the U.S. Senate in two letters: a November 5, 1977, letter to Senator Fred Thompson and a November 22, 1999, letter to Senator Strom Thurmond. This table adds adverse decisions reported through the end of 1999. The figures necessarily omit cases in which prosecutors did not report suppression orders and instances in which an unwarned statement was not offered into evidence. The number of cases in which confessions were suppressed (78) includes cases in which the government successfully challenged the suppression ruling on appeal (11), as well as cases pending on appeal (5). The table does not reflect whether the case was successfully prosecuted without the statement; whether the statement was also found to be involuntary under the totality-of-the-circumstances test; or whether the defendant ultimately agreed to plead guilty notwithstanding the suppression ruling.